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POLICY MEMO

AVOID UNJUST IMMIGRATION OUTCOMES

It is essential that immigrants participate—as victims, witnesses and defendants—in the criminal justice system, in order to ensure the safety of our communities and residents, including both citizens and noncitizens. Creating barriers to participation in the criminal justice system due to the harsh deportation policies carried out by the federal government creates vulnerability in our communities where immigrants can be preyed upon with impunity by criminals and is completely unacceptable.

Where disproportionate immigration consequences may result from a criminal conviction and/or sentence, the case will be reviewed by immigration counsel to see what, if any, changes could be made to neutralize or reduce those consequences.

Deportation following a criminal conviction has significant and often devastating impacts on the emotional and financial well-being of innocent community members, including victims of crimes. Such impacts can include separation of families; significantly increased risks of involvement of children in criminal behavior; victims left without marital or child support; and families facing economic crises (common financial repercussions of deportation include food instability, loss of housing, and greater reliance on government assistance programs).

This office accepts the guidance offered by the Supreme Court of the United States in *Padilla v. Kentucky*, which held that adverse immigration consequences, especially deportation, are an *additional* punishment – not shared by a citizen defendant – which often inexorably follows from a conviction and sentence. As such, immigration consequences are so intimately tied to the criminal process that they are “uniquely difficult to classify as either a direct or a collateral consequence.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

A citizen and noncitizen – each with the same culpability – can be convicted of the same crime and receive the same sentence. The citizen will walk out of jail and return to his family, while the noncitizen, even with a valid visa or

permanent resident status, can face the serious and long lasting additional penalty of deportation and/or other immigration related consequences (these can include: mandatory detention; inability to travel internationally; or preclusion from future immigration benefits such as applying for a green card or U.S. citizenship).

Due to the close relationship between criminal convictions and immigration consequences, and the severity of these consequences, this office further accepts the U.S. Supreme Courts' statement that "informed consideration of possible [immigration consequences] can only benefit both the State and noncitizen defendants during the [trial process]," and that, "by bringing deportation consequences into this process, the defense and prosecution may well be able to reach [resolutions] that better satisfy the interest of both parties" *Padilla v. Kentucky* at 373. Considering alternative plea offers or sentencing recommendations serves the prosecution by avoiding unjust outcomes, which are most likely to arise when the charged offense and corresponding sentence are less serious and are disproportionate to the immigration risks. Therefore, this office believes that, to the extent possible, alternative dispositions which are immigration neutral can and should be considered in all appropriate cases.

THE POLICY

1. If you become aware that a defendant is not a U.S. citizen, through notification by the defense, information in the file, or by some other means, you must contact the District Attorney's Immigration Counsel.
2. **DO NOT** inquire directly of a defendant about a defendant's immigration status.
3. **DO NOT** disclose a defendant's status to anyone outside the office, including witnesses or victims.
4. **DO NOT, under any circumstances,** contact or communicate with ICE (Immigration and Customs Enforcement). If ICE is able to reach you, state that you are not authorized to speak to them and refer them to immigration counsel.
5. All contact with ICE must be discussed with and authorized by Immigration Counsel first, with final approval from the District Attorney.
6. Where an immigration consequence has been detected at the pre-trial stage, Immigration Counsel will advise what offer or offers can be made that will avoid the immigration consequence. If trial counsel disagrees with the advice of Immigration Counsel, the Unit Supervisor must be consulted. If the Unit Supervisor disagrees with Immigration

Counsel, the District Attorney must be consulted and will make the final determination.

7. If the offer is refused and the case proceeds to trial, Immigration Counsel must be consulted to determine if a sentencing recommendation can be made that will avoid the immigration consequence. If the trial attorney disagrees with Immigration Counsel, the matter must be discussed, as indicated above, with the Unit Supervisor and, if necessary, with the District Attorney.

8. After Immigration Counsel's initial review, if changes in the case warrant a change in the offer or sentence recommendation (either lower or higher as evidence comes together or does not), or if defense presents additional information, such as a mitigation packet or immigration memo, relating to why the offer or sentence recommendation should be altered, Immigration Counsel must be notified to determine whether additional changes are warranted.

PRESUMPTIONS

PLEASE NOTE: *You must notify Immigration Counsel, regardless of the presumption.* Cases will be reviewed on a case-by-case basis. However, the following presumptions will guide the decision. The presumptions, which are based upon detailed input from the relevant units, are as follows:

MC Cases

There are no presumptions for MC cases and each will be reviewed on a case-by-case basis.

Felony Cases

In general, offers for cases that include felony charges will not be evaluated or considered until after the preliminary hearing. For cases that should be considered prior to the preliminary hearing, they will be considered through the Pretrial Unit. Any offer will be conveyed by the Pretrial Unit supervisor and shared with the MC Unit supervisors as well.

Cases where there is a presumption that an immigration neutral solution will not be sought

- Crimes perpetuated by adults against minors
- Crimes where the offer includes SORNA registration
- Crimes involving human trafficking
- Most crimes involving child pornography
- Most DV cases where the initial offer remains a felony
- Shootings
- F1 and F2 Robbery
- Cases involving the use of a deadly weapon
- Cases involving serious bodily injury

VUFA with a record of violence or prior gun possession/use
Homicides

Diversion

In general, there will be a presumption that offers will be modified to take into account immigration consequences. However, in the following cases, there is a presumption the offer will not change:

VUFA

Robbery with a gun

Defendants with disqualifying prior convictions (in line with existing diversion policies)

Family Violence and Sexual Assault

In general, there will be no presumption and cases will be looked at on a case-by-case basis. In cases where a misdemeanor is the only charge, immigration neutral changes are more likely.

CONCLUSION

In all cases, in order to arrive at the appropriate charge or disposition, for a criminal case, prosecutors routinely review and consider all relevant factors relating to the crime itself as well as all relevant factors relating to the defendant. In some cases, the factors relating to the defendant include adverse consequences that the defendant will suffer as a result of the conviction in addition to the direct consequences of the conviction. Immigration consequences often have a greater adverse impact on a defendant than the conviction alone. Most often, when considering immigration consequences, the immigration considered offer or sentencing recommendation will be commensurate with the original offer or recommendation and carry a commensurate penalty, but in some cases the offense and penalty may be greater or lesser as required for immigration consequences and our pursuit of justice.